Supreme Court, U.S.
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No. 90-5551

In The

Supreme Court of the United States

October Term, 1990

EDWARD HAROLD SCHAD, JR.

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arizona

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT EVENTS

December 14, 1978 – Petitioner indicted for first degree murder

June 18, 1985 – Petitioner's jury trial commences

June 27, 1985 – Jury returns verdict of guilty of first degree murder

August 22, 1985 – Sentencing hearing held before trial judge

August 29, 1985 – Trial Judge sentenced Petitioner to death

December 14, 1989 – Opinion and judgment of Arizona Supreme Court affirming petitioner's conviction and death sentence

March 15, 1990 – Petitioner's Motion for Reconsideration filed

April 17, 1990 – Order of Arizona Supreme Court denying Petitioner's Motion for Reconsideration

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SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

STATE OF ARIZONA, Plaintiff, vs EDWARD HAROLD SCHAD Defendant(s).	)	Superior Court No. 8752 Grand Jury No. 12-GJ-751 INDICTMENT (FELONY)

The grand jurors of Yavapai County, Arizona, accuse Edward Harold Schad charging that in ___, Prescott Precinct, Yavapai County, State of Arizona:

> On or about August 1, 1978 EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§ 13-451, 13-452, as amended and 13-453 A, as amended.

BILLY L. HICKS
Yavapai County Attorney
By /s/ Billy L. Hicks
County Attorney

December 14, 1978
Dated

A True Bill
(Foreman writes
"A True Bill")

/s/ Illegible
Foreman of the
Grand Jury

Exhibit A
Page 1 of 1 Pages

Superior Court of Arizona
Yavapai County

(Caption omitted in printing)

DEFENDANT'S PROPOSED INSTRUCTION NO. 29

ROBBERY

The crime of robbery requires proof of the following four things:

(1) The Defendant took another person's property from his person or immediate presence; and

(2) The Defendant intended to take the property from the other person permanently; and

(3) The taking was against the other person's will; and

(4) The Defendant threatened or used force against the other person with the intent to force surrender of the property or to prevent resistance to taking or keeping the property.

AUTHORITY: RAJI Criminal Instruction 19.02 as modified by RAJI Crimes 11 and the facts of this case.

DEFENDANT'S PROPOSED INSTRUCTION NO. 31

LESSER INCLUDED OFFENSE OF ROBBERY

The crime of robbery includes the less serious crime of theft. The State may prove theft beyond a reasonable doubt, but fail to prove the more serious crime of robbery beyond a reasonable doubt.

The crime of theft requires proof of the following two things:

(1) The Defendant knowingly controlled another person's property; and

(2) The Defendant intended to deprive the other person of the property.

If you find that the Defendant committed a theft rather than a robbery, then you must find him not guilty of first degree murder based on his having committed or attempted to commit a robbery.

AUTHORITY: RAJI Criminal Instruction 1.03; RAJI Criminal Instruction 18.021; *State v. Celaya*, 135 Ariz. 248, 251-253, 660 P.2d 849 (1983).

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

[p. 1343] [Caption omitted]

[Excerpt of settling of
jury instructions and
verdict forms)
Flagstaff, Arizona
June 27, 1985

* * *

[1344] THE COURT: Now, 31, I'm refusing that. That's the one that talks about theft.

MR. SHAW: I object to the refusal of 31 on the basis of State v. Salia [sic], can cite the case for that.

THE COURT: Okay. I don't think Salia [sic] fits that.

* * *

You have looked over the forms of verdict. Any problems with those?

MR. SHAW: No.

MR. DAWLEY: No, Your Honor.

* * *

[p. 1347] [Excerpt of Prosecutor's closing argument]
Flagstaff, Arizona
June 27, 1985

* * *

Let's talk about the specifics of this case. If you look at the easel, members of the jury, I have drawn up the elements, or the components parts [sic], of first degree murder. There are two types of first degree murder, two ways for first degree murder to be committed. On the left is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice. And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.

And you will also be instructed that if the defendant used a deadly weapon, as he did in this case, the ligature, that you may find the intent to kill from the use of that deadly weapon.

And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components parts [sic]. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a [1348] robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder.

If you'll look at the easel toward the lower left-hand corner there, members of the jury, I have put the word second degree and then under that no premed.

All that means to say is the difference between premeditated first degree murder and second degree murder is that the first two elements, a killing with malice, do apply but if there's no premeditation then it's second degree murder.

You'll be given three forms of verdict in this case, guilty of first degree murder, guilty of second degree murder, or not guilty.

If you find either a premeditated murder of a felony murder, then you will find the defendant guilty of first degree murder.

In this case, both types of first degree murder apply.

* * *

[p. 1363] [Excerpt of Defense Counsel's Closing Argument]
Flagstaff, Arizona
June 28, 1985

* * *

Now the State will argue, well those don't have any relevance. Who knows what they might have? The point is a sheriff's deputy seized them and thought it had relevance, thought they were going to be fingerprinted and then they weren't. The mirror which was found in the Ford automobile, [1364] the only item there that tended to connect the Ford automobile with the victim, was not fingerprinted. You heard all of the evidence from all of the police officers, even the ones who didn't fingerprint it, that it should have been fingerprinted.

How is this important? Well, it's important because there was evidence that was fingerprinted in the Ford automobile. Thank goodness we had the Coconino County sheriff's people who at least had the foresight to take fingerprints of that Ford. And they lifted seven to ten fingerprints, one witness said seven, the expert witness for the defense said ten, from areas in which the driver would have touched that automobile. Those fingerprints did not match any of the people whom we know touched that automobile.

I submit to you if the State had have taken fingerprints of the Cadillac automobile, if it had matched any of those, any of the unidentifiable fingerprints on the Ford automobile, we would then have had somebody else that was involved with this murder, somebody else who could have done this job.

We don't have any testimony as to how Mr. Schad would have acquired the car that he acquired or how he acquired the credit cards, but we do have evidence now that somebody else was also in that vehicle.

Now the State probably is going to stand upon in a few minutes, when they get their turn, and say, well, the fact that [1365] there are no fingerprints that are identifiable isn't important, because that could be anyone. I submit to you Officer Richardson, when he found that automobile – what did he say? Did he say that had been stripped, that it had been gone through, people had been there putting their hands on it? No.

And we know that automobile had been in Phoenix on August the 1st, 1978. It was noticed on this highway 89, north of Flagstaff, at 6:30 in the morning. That's pursuant to the testimony of Richardson, on August the 3rd, 1978, so it would have been there for about a day. And there was no evidence of any tampering with it. So we do know, in light of the fact that Ed Schad had driven that automobile, Wilma Ehrhardt had been in that automobile, that since his fingerprints aren't on that automobile in places where the driver would have driven, that somebody else was connected to that car.

We also know that the murderer may we [sic] have touched that Ford – that mirror which was found in the Ford. If fingerprints had have been taken and Ed Schad's would have been excluded, again that would have been a very important piece of evidence for the defendant. That's why we have the instruction that since the evidence was not preserved you may infer the true fact would have been against the State.

What else was done in this case to tend to show this? A serological exam was done. I'm not sure whether it [1366] was performed by the Coconino County sheriff's deputies or by Detective Hansen, but evidence was taken out of the Ford to determine if there was any violence in that evidence. That was the seat cushion. It was sent to the department of public safety in Phoenix. What do we find there? No evidence of blood, no evidence of stains, no evidence of violence.

We find from Sergeant Judd at the scene of the Ford no evidence of any violence, no evidence of any blood, no evidence of anything, of any wrongdoing at that time. So once again we find more and more facts that tend to show that the crime could not have occurred where the Ford was.

Let me talk to you as to why that's important. If the murder occurred where we suggested it occurred, right where the body was found, off of the pulloff area south of Prescott, there appears to be no possible way Ed Schad could have been driving that Ford, met the victim and murdered him there, because he was known to be alone, and there's no way that he could have handled two cars to one time and somehow deposited the Ford 150 miles north where it was found, or north and west. So that's impossible.

So that's why the State's only theory in this case – and they haven't talked about it but I suppose they are going to in in [sic] rebuttal – was that the murder would have had to have happened where the Ford was, and that's where they spent all the time they tried to to [sic] get this route of Lakeside into [1367] evidence, to get the

victim going to Lakeside, because then it would be more likely he could have wound up north of Flagstaff where the Ford was, rather then where his body was found south of Prescott.

I'll talk about that in a minute, but let me get back to the evidence which we don't have.

We don't have fibers, any hairs taken off the body. You heard the medical examiner, Dr. Keen, testify that it's common to take fibers off the shirt and so forth, it's common to take hairs. One of the reasons why he didn't do it is he doesn't have the kind of laboratory, the kind of facilities, that Dr. Halpern has in New York City. And I ask you, should we – is it right that we would get a fairer shake if we were a defendant in a case like this in New York City than we would in Prescott, Arizona? Does it really make sense that some communities ought to get better investigation? I don't think so.

No fingernail scrapings were done. Dr. Keen has testified that the murdered, the killer, would have been to the front of the victim. He would have murdered him right here where the hyoid bone was broken, to the right front, that very likely there would have been a struggle, he testified, because it would have been improbable for the rope to be put around the neck while the other person is sleeping without some sort of a struggle and being strangled from the front. Therefore there's [1368] likelihood of the scratching and the clawing out. No fingernail scrapings were taken from the victim. No scrapings were compared with the defendant. If they had have been compared and excluded by the defendant, they would have been evidence helpful to him in this case.

We also know from the trooper that saw Mr. Schad and from the – on September the 3rd, and from the people that saw him on September the 7th and 8th, that Mr. Schad did not have anything wrong with his appearance, his face, did not have any scratches. So that again tends to go along with the fact that if this evidence had have been taken, it would have tended to exclude Ed from this case, and that's why again we have the instruction that you're going to get.

We had no inventory of any of the items found in the Cadillac until December the 5th by Detective Hansen. We had a moving of those items by Detective Halterman from the interior of the Cadillac to the truck of the Cadillac. We had clothing on the body which was destroyed by the medical examiner's office, and he knew that was not proper but he did it because he didn't think it had any relevance, but yet he didn't keep it so it could be compared with any transfers from any of the cars in this case. We had had the keys which were found on the body also destroyed.

What significance does that have to the case? We do know that there is a trailer missing in this case, and I submit [1369] to you that that trailer has never been found. The trailer has been investigated by Detective Hansen. He checked every state in the union, 48 states, to see if they had any evidence of it. He flew over the area from a little bit north of Prescott to way south of Prescott, found no evidence of it. Lynn Bell testified yesterday afternoon that he sent a wants check himself to every motor vehicle department in every state in the union, including Alaska, and he found no evidence of it.

Is it reasonable to assume, I ask you, that Ed Schad would have sold that trailer to somebody and somehow it never got reported or never got any title to it? Especially when Ed Schad, as the trooper mentioned, accidentally gave the trooper the trailer title which was in the car when he was given a speeding ticket on the 3rd of August, 1978? Or is it more reasonable that that trailer might have been buried somewhere never to be able to be found again, which it has never been found. And with regard to the trailer, the keys that were taken off the body and now have become destroyed by State, may have been important. If there wasn't a trailer key in that group of keys, we know from Dr. Keen's testimony there were six or seven keys, if there wasn't a trailer key, that would tend to show, would it not, that the person who was involved with Mr. Grove at the time of his death was close to him, knew about the trailer and the keys and was more likely to get that key, somebody who had an association with Mr. Grove. That's an [1370] important factor also.

Regarding the mirror in the Ford, again don't speculate. What else do we have in this case that is suspicious and that there is no – the State can give no reason for being there?

We have Trilogy clothing. You heard us mention that on many occasions. It has snags on it, it has stains on it that have never been analyzed, have never been compared with samples of the vegetation at the scene.

We have clothing that was not owned or worn by Wilma Ehrhardt.

Do you remember when she testified, and I had her stand up to see if it fit, and most of you stood up to make sure about this, she put it up to her waist, and unlike me it went way to the bottom, because she's five foot two and I'm six feet tall. So it obviously doesn't fit her. There's no other person in this case that could fit that clothing.

We have a rust – a red rust robe also that's found in the Ford automobile. You saw that when Ms. Ehrhardt tried that on, or I don't know if she tried it on but she looked at it, she said it was not hers. It's got a lot of hair connected to it. You can compare that hair with Wilma Ehrhardt's hair and the color of it and so forth, compare that as another item of evidence that's connected with the Ford.

We have Belair cigarette cartons that are found both [1371] in the Ford, I'm not going to get them out now, but they were found both in in [sic] the Ford and the Cadillac and they are unconnected to either Ed Schad or Wilma Ehrhardt. You heard the testimony of Wilma regarding that.

I might add there was another suspicious item that was found in the Cadillac that – that item found in the Cadillac, I cannot see it here offhand. Oh, here it is, an item found in the Cadillac that came out of the Cadillac, right in this bag, right out of one of the exhibits, it's a National Enquirer of September 12, 1978, and there's an Omaha World Herald newspaper of June 22, 1978, along with more Belair cigarette cartons, Belair cigarette packets.

These were some of the items that came out of that Cadillac automobile also.

Who would have been to Omaha, Nebraska on June 1978? Something for you to consider in this case. Perhaps it's a small point but it is a point.

We have a photograph found of two people at Niagra [sic] Falls, New York. That's found in the Cadillac.

We have just happen to have the coincidence of the Tison gang. You heard the testimony of Lieutenant Judd, just happened to be going up highway 89 on or about August the 1st, 1978. There's no other evidence, but it just happened to be, it's a coincidence and we know that they killed people for their cars. We know that they buried one car. One car was [1372] buried in the Sunset Crater area, I think Lieutenant Judd said, which is not far from where the Ford was found. We also know we have unidentifiable prints found in the Ford.

All these are things for you to think about and consider when you decide whether the State's case against Ed Schad is speculation or conjecture as to whether he would have been the murderer in this case.

Perhaps, ladies and gentlemen, one of the most critical facts in this case is that Lorimer Leroy Grove was known to be taking at least $2,184 in cash with him on his vacation. That was the testimony of Robert Butler who gave him a check on July 31 which was cashed by him. The Arizona Bank fraud investigator Ron Cross, said yes, this check was cashed, no evidence it was deposited.

He had that large amount of money then on his person. There was testimony from Mr. Williamson he

always carried large amounts of cash on his person. There was testimony from his banker Mr. Pilcher yesterday that he was known to carry three and – three to four thousand dollars in cash on his person.

Did Ed Schad, if he had murdered this person, get that cash? Consider that. Consider whether that's reasonable.

Or was Ed Schad totally out of cash by the time he got this Cadillac sometime on August 2nd, 1978, because he immediately and so soon begins using a credit card. If he were [1373] the murderer, would it be logical to begin using the victim's, the person he murdered, credit card then use it throughout the United States for 70 or 80 times that Mr. Dawley talked about? Would this be logical? Or would he use it because he is out of cash? Which we know he was looking for a job, from evidence we found in the Ford, on July 31 and August 1st in the Phoenix area.

We also know that he forged, or evidence is he forged a check to himself for cash on August 7, 1978, in DeMoines, [sic] Iowa. There's another check which is in evidence. So is it logical, I ask you when you consider this case in the jury room, is it reasonable, is it logical, to assume that he would be the murderer knowing this, knowing that he could be easily found out by using that credit card if he had in fact murdered the person?

He doesn't know Mr. Grove. There's no evidence he would have known him before. There is no evidence that they were ever associated, that they had ever been with each other. The evidence was Ed Schad had been in Florida at least to sometime in July and then in Ohio to

July 24th. He didn't know therefore where Mr. Grove was going. If he had have met Mr. Grove he wouldn't know who Mr. Grove was going to see or who would report about him, so therefore consider that cash situation as a factor, and as a factor that further lends to speculation and very much doubt as to whether Ed Schad could [1374] have been the murderer in this case.

Also consider the fact that Ed Schad would have known about the Tisons who would have escaped from the Arizona state prison. Some of those photographs as I pointed out with the Coconino County deputies – not some of the photographs, but some of the newspapers found, the Mesa Tribune and Arizona Republic that were dated July 31 and August 1 have detailed articles. In one case it's a front page article, I believe, about the escape just a day or two before of the Tisons and the fact that everybody in the state, the police agencies, were on a manhunt loking [sic] for them. There was a statewide manhunt.

So therefore when you consider the theory of the Ford, the murder being at the Ford, consider this: Is it likely, is it logical, is it reasonable for a murderer to be traveling with a body 150 miles from the site of that Ford to a pulloff area south of Prescott while all these police are scouring the country for the Tisons? It's an interesting thought and something to also consider.

What do we know about the victim in this case? What suspicious circumstances are there regarding him which the State cannot overcome in this case? Number one, we know in June of 1978 he had used his credit card. He had used it in Sedona at the Oak Creek Owl restaurant. He

had bought $29.68 worth of food. And you heard testimony from the manager of it yesterday that a regular entree was probably in the [1375] neighborhood of $10. Is it possible Mr. Grove was with another person at that time? Consider that and consider the amount of money spent.

You also have a Travelodge credit card use of Mr. Grove's credit card in June 1978 at a Flagstaff Travelodge. Now, we don't know any more as to which one it was. That's why we called both of the Travelodge people here to testify. The downtown Travelodge, the one that wasn't quite as nice, they had records back to that time, and they didn't find it, so I think we can prove by inference that that wasn't the one that Mr. Grove would have been at.

The other Travelodge, the one out on I-40, do not retain their records. So if you compare that with the fact a credit card receipt was used there on Grove's credit card it appears that Mr. Grove was staying in a motel and spending $37.40. There is also a King's Ransom motel in Sedona at about the same time, and a bill there of $29.04.

Did Mr. Grove meet somebody there? Did Mr. Grove have a friend there? Did Mr. Grove meet somebody that might have had a reason to dislike him to know that he always carried a lot of cash on his person and therefore might want to kill him? Did Mr. Grove know about this on July 28, 1978? Was Mr. Grove afraid for his life? Was he being blackmailed? Why does he write a will hurriedly, with abbreviations, not his normal practice, and then says "in case I do not return from Washington."

[1376] These are things which I believe can be considered. Did he meet somebody on the trip? Was he going to

meet somebody in Phoenix or wherever, who may have killed him? That's another factor for you to consider which the State cannot disprove in this case.

And finally we have those joint accounts. We have his own joint account that he had with his wife Lodima which was closed out and money was put into his own account at that time. These were savings accounts and these are in evidence, and we have one substantial withdrawal of $30,000 cash on July the 18th, 1978, and we don't see that money ever being redeposited anywhere. Did he have all have [sic] that money with him on his trip? He did also withdraw another $24,000 on or about August the 1st, the day he left, but that's redeposited. But there's a $30,000 which we don't know what happened to.

What likely happened in this case? Did Mr. Grove leave on August the 1st, 1978, at 9:30 a.m., which is the uncontradicted testimony of Ken Thomas, the last person to see him alive, and did he travel to Washington heading in the northwest direction via the route we have suggested, heading west up I-10 to Phoenix and then over here to Prescott and then out this way, or, as Mr. Dawley I believe wants to suggest, going in a different direction, way over here in the Lakeside area, which is right here, and stopping to see people who we don't know anything about, who an investigation was made and [1377] they were never discovered, who they are unnamed people? Which is logical? Consider that in your conclusions as to what route he was going.

We do know that the route to where the body was found is 310 miles. It's about a day's drive if you leave at 9:30 in the morning, you are probably going to get there

about four – to that point about four or five in the afternoon. We do know that the body is found by a pulloff area in a – in the Prescott national forest. It's right before four campgrounds. We do know that Mr. Grove frequently goes to national forest campgrounds, Mr. Williamson said that. He frequently takes his trailer and he uses it. We do know from Mr. Williamson that he frequently stops, I believe he said, at pulloff areas. This happens to be a pulloff area where his body was found which had shade, which was relatively secluded, and which was one that likely he would stop at. It was the most direct route to the state of Washington. It had evidence of public use.

Did he go there? Did he meet somebody in Phoenix or somewhere along the way? Did he take him with him? Did the person – did somebody kill them there? Was he met by somebody else who would have killed him there? Was he met by the Tisons, for all we know, who needed a car, who needed to get rid of cars fast? Consider all these possibilities.

Also consider the fact that two people must have been involved in the murder. The body was found neatly placed. [1378] Now this is a man, I think he said he was five feet ten, Dr. Keen said. I don't know if his weight was mentioned. I thought he said 160 or 145 pounds. I think a weight was mentioned. We have a person who would be dead. If he were killed as the State is going to surmise, somewhere other than the point where the body was found, there's no evidence of any dragging of that body through the thick brush. There's no evidence of that, so therefore it seems logical to assume there would have been two people that could have carried that body,

two people that would have been involved, two people that would have placed it neatly. Mr. Schad was always known to be alone.

The Ford area. There was no pulloff where the Ford was found. The Ford was found in an area that did not have public use, that had big pits next to it. If a killing would have occurred there, is it likely to assume that the body could have been buried very easy in that pumice material? The pumice is in evidence and you heard the testimony from Mr. Bell about that. There's no evidence, as I mentioned a minute ago, of any violence at the site of the Ford. Is it logical to assume then that a person would kill somebody at the site of the Ford, leave the Ford there, take the Cadillac, travel in the Cadillac with the body, where there's no evidence in the Cadillac whatsoever of any violence or any evidence of any bloodstains or anything, and then just happen to deposit that body at a pulloff area in the Prescott national forest in the type of [1379] area that Mr. Grove with [sic] would naturally want to stop at, and pass up thousands, literally thousands of other places on the way where the body could have been put, hidden, in a manner that it most likely never would have been found. Is that likely? Consider that when you discuss the evidence in the jury room.

Also consider the fact that in that drive the person would have to drive right through the center of the city of Prescott in order to get south of Prescott on Highway 89 into the White Spar area, and this would have to be again after a 150 mile trip.

So I ask you, is there any proof beyond a reasonable doubt that Ed Schad could have been the murderer in this

case? Absolute firm proof, not subject to any conjecture or speculation? If he had, he would have had to have killed him north of Flagstaff where the Ford was found. Consider all of that with the evidence in the case.

Did the State stop trying to solve this crime when they found evidence of a forgery and in control of somebody else's car? That's what they found. Did they stop doing their work? Did they – they didn't seize any of the evidence at the scene. As a matter of fact the chief investigator didn't testify, and there's no police report out of him, who was at the scene of the body. The officers who testified about that, Mr. Hansen and Mr. Williams do not know who was in charge. Mr. [1380] Hansen was in the internal investigation at that time. He was helping out Capp Bates at that time with photography. Does this fact, the fact of the investigation by the State, make a difference in this case? Does it lead to a theory? Consider that when you decide whether the State has proven beyond a reasonable doubt that Ed Schad is connected with this murder.

There were cans of cord that have been introduced into evidence by the State found at the home of Mr. Grove, at his trailer home, the one that was in Bisbee, not the travel trailer with him.

Mr. Dawley introduced those into evidence, and pointed out that there's a loop on the end of them that is somewhat similar to the murder weapon. We have loop on the end of it. I don't know what significance he thinks that has other than the fact that it may tend to indicate that if the murder weapon rope is one of Mr. Grove's very own ropes and it comes out of his house, then that

somebody who knew him at his house and would have been at his house could have been the murderer. Somebody such as the person in Alaska, Joe Macalester who we have never seen or heard from since and Mr. Williamson tried to contact after that. He's disappeared in Alaska. But despite that the evidence is, through the FBI rope examiner, hair examiner, who has done an investigation at our request, at the defense request, and was asked to do some investigation right before you here in Court, testified that these ropes were not [1381] similar at all, they were completely different.

What about the statements of Ed Schad? What do they show? We have statements of Ed to a trooper in New York to, to Detective Johnson in Salt Lake City, that he was delivering this Cadillac for an elderly person. In one case he was delivering it to somebody in New York, I forget who the other guy said, maybe they were both – well, yeah, one was Bridgeport, New York, the other was New York City, which he had been.

Ed Schad, I'm not going to stand up and say that he is without any blemish at all. He was in control of somebody else's car. I think he knew that. He was in control of somebody else's credit card. I think he knew that; he was forging it. He was a thief at that time, but he was not – that does not mean, does it, that he was a murderer? This is a common statement, is it not? Consider it. If you are in somebody else's car, what's the normal explanation you are going to give if you want to give an explanation as to why you have got that car? That you are delivering it for somebody and that you are delivering it for an elderly person, because it's an elderly person you would think

who doesn't like to drive. So you are delivering it for him. That's the explanation for that statement.

Now, Mr. Dawley said he made a statement regarding a trade to Wilma in Columbus, Ohio. Wilma didn't say that. That [1382] was a misstatement on Mr. Dawley's part. Wilma said that she had been left by him when he was going to look for work in Columbus, Ohio, and she didn't know where he had made the trade. But it's all consistent.

Now, then, Mr. Schad talks to Mr. Johnson, and when does he say he doesn't want to talk? When does he want to invoke his rights not to talk to Mr. Johnson? That he feels bad about something, when Mr. Johnson asked him a question about forging his signature, the forgeries he had done, the check he had done. At that point the questioning is stopped. Not when he asked him about how he gets the Cadillac. That's an interesting fact I think for you to consider in this case.

What about the murder rope, the little rope which is exhibit 1, which you'll get a chance to look at? What kind of rope was it? It's a kind of rope which can be used in awnings, said the FBI expert Jack Quill, the kind of rope that can be used by campers and back packers. That's a significant fact when Mr. Grove's body is found in the Prescott national forest near places where people camp.

What about the ring? There's no evidence that – no evidence whatsoever in this case about what Ed Schad knew about the ring. We do know Wilma first saw the ring in the glove compartment of the Cadillac. The assumption there is Mr. Grove would have put that ring, if he had it, in the glove compartment. We don't know

what Ed Schad said about that. The [1383] State didn't rpve [sic] you any connection that Ed Schad had it personally. The State objected to any testimony by Wilma as to what Ed Schad commented to her when the ring was found.

Has anybody, has any witness testified in this case where the murder occurred? No, but I submit to you the murder occurred right where the body was found. Isn't that the logical thing to assume, in light of all the other facts and inferences that are in this case? Is it possible that Ed Schad had ever met Larry Grove before? We know in June through at least July 24th, Ed Schad was thousands of miles away from the state of Arizona. He could not have gotten to Arizona until sometime after July 24, for the very first time.

• • •

[p. 1403] [Excerpt of Judge's instructions to the jury]
Flagstaff, Arizona
June 27, 1985

* * *

Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant has no considerable provocation for the killing you may find malice. There is also a second kind of malice. A person has this kind of malice if he shows a reckless disregard for human life.

Once you have determined that there is malice, you must determine if the murder was in the first or second degree. First degree murder is murder which is the result of premeditation. Premeditation means deciding in the mind beforehand. It does not matter how quickly or slowly the decision to kill is followed by the act of killing.

[1404] Murder which is committed in the attempt to commit robbery is also first degree murder.

All other kinds of murder are second degree.

If you have a reasonable doubt about which of the two degrees of murder was committed, you must decide it was second degree murder.

Robbery is the wrongful taking of the personal property in the possession of another from his person or

immediate presence and against his will accomplished by means of force or fear.

The crime of first degree murder includes the less serious crime of second degree murder. The State may prove second degree murder but fail to prove the more serious crime of first degree murder. You are permitted to find the defendant guilty of the less serious crime of second degree murder, one, if the evidence does not show beyond a reasonable doubt that the defendant is guilty of first degree murder. Two, if the evidence does show beyond a reasonable doubt that the defendant is guilty of second degree murder.

In the case of certain crimes it is necessary that the criminal act be accompanied by a specific or a particular intent without which the crime is not committed. Thus in the crime of robbery, a necessary fact to be proved is the existence in the mind of the defendant of the specific intent to wrongfully take the personal property in the possession of [1405] another from his person or immediate presence and against his will, and unless such intent to do so exists that crime is not committed.

Force means any physical act directed against a person as a means of gaining control of property.

All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty.

When you go into the jury room you will choose a foreman who will be in charge during your deliberations and who will sign any verdict. You may come to one of three verdicts. You may return a verdict of guilty of murder in the first degree. You may return a verdict of

guilty of murder in the second degree. You may return a verdict of not guilty.

You will be given three forms of verdict on which to indicate your decision. They read as follows. They are in no particular order.

Omitting the caption, they go as follows: We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of second degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward [1406] Harold Schad, Jr., not guilty.

Counsel, are there any additions or corrections to the instructions?

MR. DAWLEY: I have none, Your Honor.

MR. SHAW: No, Your Honor.

* * *

IN THE SUPERIOR COURT

Of the State of Arizona,
In and For the County of Coconino

(Caption Omitted In Printing)

NO. 8752
VERDICT

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of First Degree Murder

/s/ Kenneth J. Henscheid
Foreman.

SUPREME COURT OF ARIZONA,

En Banc.

163 Ariz. 411

STATE of Arizona, Appellee,

v.

Edward Harold SCHAD, Jr., Appellant.
No. 4876-3.

Dec. 14, 1989.

WILLIAM F. HOLOHAN, Justice (Retired).

The defendant, Edward, Harold Schad, Jr., was convicted by a Yavapai County jury of first degree murder and sentenced to death. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). On the defendant's petition for post-conviction relief, this court reversed the conviction, holding that the trial court committed fundamental error by instructing the jury on felony murder without defining the elements of the underlying felony. *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, the defendant was again convicted of first degree murder and sentenced to death. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4031.

The facts of this case are fully set forth in our 1981 opinion, *supra*. Briefly summarized, the following facts led to the defendant's conviction in the second trial.

The victim, Lorimer "Leroy" Grove, was last seen alive on August 1, 1978, when he left Bisbee, Arizona for Everett, Washington in his new Cadillac. His body was discovered August 9, 1978, off the highway just south of Prescott. The corpse was not identified until October 11,

1978, after the defendant's arrest. The killer had strangled the victim to death with a small rope tied around his neck.

The defendant's connection with the homicide is established only by circumstantial evidence. Beginning with the day after the victim left Bisbee, the defendant made numerous purchases with the victim's credit cards. The police recovered credit cards from the defendant's wallet after his arrest. The state also introduced a forged check drawn on the victim's bank account and made to the defendant's order for "wages." A car the defendant had rented, but never returned, was discovered in Flagstaff in early August, 1978. Discovered in this car was a "unique mirror contraption" designed and built by the victim. On September 3, 1978, New York authorities issued the defendant a speeding ticket for an offense he committed while driving the victim's Cadillac. The defendant explained to the citing officer that the car belonged to his friend Leroy Grove. Late in September, the defendant drove the Cadillac to Salt Lake City, Utah. While he was in Utah, the Salt Lake City police arrested the defendant for investigation of a possible parole violation and possession of a stolen vehicle. During his incarceration in the Salt Lake City jail, the defendant spoke with John Duncan[1] and made several inculpatory statements. Thereafter, a Yavapai County Grand Jury indicted the defendant for the murder of Lorimer Grove and the authorities extradited the defendant to Arizona to stand trial.

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[1] Duncan had been staying with the defendant's girlfriend when the defendant arrived in Salt Lake City.

The defendant raises the following issues for our consideration:

1. Did admitting statements that the defendant made to John Duncan in the Salt Lake City jail violate the defendant's constitutional rights?

2. Was the defendant denied a fair trial when the state failed to preserve the victim's clothing and preserve fingerprint impressions on items found with the body and on the mirror contraption?

3. Did the trial court commit error by failing to instruct the jury on, and provide a form of verdict for, the lesser-included offense of robbery?

4. Did the trial court err when it refused to give forms of verdict for both premeditated murder and felony murder?

5. Was it proper to use the defendant's prior murder conviction as an aggravating factor?

6. Were the defendant's double jeopardy rights violated when two aggravating factors were found based on a single prior conviction?

7. Were the defendant's rights violated when the trial court found that the the [sic] defendant committed the murder for pecuniary gain?

8. Did the court fail to properly weigh the mitigating circumstances?

9. Did the defendant's "inability" to "voir dire" the trial judge deprive him of a fair trial?

10. Is Arizona's statutory death sentencing scheme unconstitutional?

In addition to addressing the issues raised by the defendant, we independently review the aggravating and mitigating circumstances found by the judge, determine whether the defendant's sentence is proportional to similar cases, and search the record for fundamental error.

THE STATEMENTS

At the defendant's second trial, as in the first trial, the court permitted the state to present testimony by John Duncan concerning statements the defendant made to him when he visited the defendant in the Salt Lake City jail. The defendant's most incriminating statement was that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

This court reviewed the circumstances surrounding Duncan's testimony in our 1981 opinion in light of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). *Schad*, 129 Ariz. at 565 633 P.2d at 374. We found that Duncan and the Utah authorities had no agency relationship, that the police did not actively or deliberately solicit Duncan's assistance and that the evidence obtained was insignificant. Therefore, we concluded that the trial court properly denied the defendant's motion to suppress the statements. *Schad*, 129 Ariz. at 566, 633 P.2d at 375. Nevertheless, the defendant's counsel again moved to suppress the statements prior to the second trial because new evidence allegedly

justified a rehearing and established grounds for suppressing the testimony at the new trial. This new evidence consisted of:

> 1. Testimony from Sergeant Judd of the Coconino County Sheriff's office that Detective Halterman described Duncan as an "informant" and a "confidential informant."
>
> 2. Testimony that Detective Halterman had asked Duncan if he would be willing to visit the defendant in jail and arranged the visit for a Monday. Monday was not a normal visiting day, so Duncan could not have made the visit without special arrangements.
>
> 3. Detective Halterman arranged for Duncan's release pending extradition.

Despite this "new evidence," the trial court again denied the defendant's motion to suppress. The judge concluded that the use of the word "informant" by Detective Halterman was a matter of semantics rather than of substance. In his ruling the judge stated:

> The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of act, a confidential informant. The way we come up with the language confidential information and informant in this particular case is from Lieutenant Judd from his police report . . . but of course as you know, Lieutenant Judd had no facts upon which to base a conclusion that . . . Mr. Duncan might be what we have come to know as the confidential informant.

R.T. Vol. VI, p. 815.

Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. R.T. Vol. VI,

pp. 672 and 809. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police department arranged his visit. *Id.* at 804. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month *after* Duncan's visit. *Id.* at 666, 803. Finally, Duncan's release pending extradition was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.

It is unnecessary to review the relevant case law. We do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

PRESERVATION OF EVIDENCE

The state did not (1) preserve the victim's clothing; (2) fingerprint items found with the body; or (3) fingerprint the mirror device found in the defendant's abandoned rental car. The trial court did give a *Willits* instruction.[2] *State v. Willits*, 96 Ariz. 184, 393 P.2d 274

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[2] The jury was instructed:

> If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality is in issue, you may infer that the true fact is against their interest.

(1964). Despite this instruction, the defendant argues that the state's failure to process these items, especially the mirror, deprived the defendant of exculpatory evidence in violation of his due process right to a fair trial. The defendant contends that had these items been processed, he could have proved that someone else committed the crime.

The state counters that the defendant is barred from relief because he failed to raise this issue at the first trial. The only case cited by the state is inapposite because it concerns waiver of issues by failure to object at trial. Although the defendant did not raise this issue until the second trial, we find that his pretrial motions properly preserved this issue for review.

The "substantive" issue raised is whether the state had a duty to preserve the victim's clothing,[3] and to collect and process fingerprints from the mirror and other objects. The defendant argues that the state's failure to collect *and preserve* potentially exculpatory evidence requires reversal of the conviction and dismissal of the charges. *See California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Mitchell*, 140 Ariz. 551, 683 P.2d 750 (App.1984).

In *Trombetta*, the U.S. Supreme Court held that the due process clause of the 14th Amendment does not require the state to preserve breath samples in order to introduce the results of breath-analysis tests at a DUI

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[3] It should be noted that the state's expert testified that the victim's clothes were forensically useless due to the advanced state of decomposition.

trial. 467 U.S. at 491, 104 S.CT. at 2535, 81 L.Ed.2d at 423. Under the Federal Constitution, the state's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488, 104 S.Ct. at 2534, 81 L.Ed.2d at 422. This materiality test requires that the evidence (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be such that the defendant would be unable to obtain comparable evidence by other reasonable means. *Id.* at 489, 104 S.Ct. at 2534, 81 L.Ed.2d at 422. The Court concluded that "the chances are extremely low that preserved [breath] samples would have been exculpatory." *Id.*

Recently, we held that a *Willits* instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith. *State v. Tucker*, 157 Ariz. 433, 442-43, 759 P.2d 579, 588-89 (1988). *Tucker* held that the partial latent fingerprints destroyed by the state "had some forensic value in excluding the defendant from having left the prints," but "coult not have excluded Tucker from having handled the gun, and certainly could not have excluded him from committing the crime." *Id.* at 442, 759 P.2d at 588. Thus, we concluded that a *Willits* instruction adequately protected the defendant's rights. *Cf. State v. Hannah*, 120 Ariz. 1, 583 P.2d 888 (1978) (where the only items connecting the defendant to the crime were destroyed, we found that the defendant had been so seriously prejudiced by the loss of the evidence that he could not receive a fair trial).

The state concedes that any recoverable fingerprints which may have existed were probably destroyed in the defendant's first trial. The state urges us to consider that the defendant had ample opportunity to analyze the mirror before the prints were destroyed and that defense counsel participated in their destruction. It may well be that the defendant's counsel participated in the destruction of evidence. However, the duty to preserve evidence remains with the state and nothing in the record shows the defendant or his counsel solely responsible or more culpable than the state for the loss.

Nevertheless, we find that the *Willits* instruction adequately protected the defendant's rights. Unlike *Hannah*, the mirror was not the only piece of evidence linking the defendant with the crime. The defendant was arrested in possession of the victim's credit cards and car. He told the New York patrolman that he was driving the car for the victim. Furthermore, as we found in *Tucker*, a *Willits* instruction adequately addressed the loss of the fingerprint evidence.

> The best possible scenario for Tucker is that an examination of the partial latent prints would have excluded him from the set of persons whose prints were on the gun. However, as stated above, such an exclusion would not have excluded Tucker from ever having handled the gun and certainly would not exonerate Tucker of the alleged crime. As Tucker's expert explained, Tucker could have touched the gun, but not left a print, or the print could have been easily wiped off either intentionally or unintentionally through subsequent handling. We find no reasonable possibility that defendant was prejudiced by the destruction of the partial latent prints. [Citations omitted.]

> Moreover, under the *Willits* instruction, the jury could infer exactly what the destroyed evidence, at best, could have proved – that Tucker's prints were not on the gun. Under these circumstances, where the destroyed evidence would not exonerate Tucker, and where the *Willits* instruction provided the same benefit as any independent examination of the evidence, the *Willits* instruction protected Tucker's right to a fair trial.

Tucker, 157 Ariz. at 443, 759 P.2d at 589.

Similarly, in the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of these objects, nor would it have exonerated him of the alleged crime. The *Willits* instruction accomplished the most that the defendant could have proved – that his prints were not on these items. We find that the defendant's rights were adequately protected.

FAILURE TO GIVE ROBBERY INSTRUCTION OR FORM OF VERDICT

Here the defendant contests the trial court's failure to give a lesser included offense instruction or to provide a form of verdict for robbery. Defendant argues that *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), requires a robbery instruction and form of verdict because: (1) the evidence supported a conviction for the offense of robbery; and (2) the robbery is a lesser-

included offense of the felony murder because it was the underlying felony.

Although the defendant concedes that he did not request such an instruction of verdict form, he argues that it was fundamental error. He also maintains that counsel ineffectively assisted him in failing to request such instructions. In an Arizona capital case, the trial court must instruct on all lesser-included offenses supported by the evidence. Failure to do so, with or without a request, constitutes fundamental error. *State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988). However, in Arizona there is no lesser-included offense to felony murder. *State v. LaGrand*, 153 Ariz. 21, 30, 734 P.2d 563, 572, *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *see also State v. Leslie*, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985); *State v. Martinez-Villareal*, 145 Ariz. 441, 446-47, 702 P.2d 670, 675-76, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. *LaGrand*, 153 Ariz. at 30, 734 P.2d at 572. His attorney's failure to request one was not ineffective assistance of counsel.

SINGLE VERDICT FORM FOR FIRST DEGREE MURDER

The defendant next argues that the trial court erred when it submitted to the jury one verdict form for the crime of first-degree murder while instructing them that the crime could be committed in either of two ways – by

premeditation or by the commission of a felony. The defendant's arguments on this issue have all been previously decided by this Court and rejected. In *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982), we stated:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. *See State v. Axley*, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, *State v. Counterman*, 8 Ariz.App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

Id. at 496, 647 P.2d at 627.

Our decision in *State v. Smith*, 160 Ariz. 507, 774 P.2d 811 (1989), did not change the substantive rule that it was not error to have one form of verdict for first degree murder even though both premeditation and felony murder were being submitted to the jury. *Smith* does, however, strongly urge that alternate forms of verdict be submitted to a jury when a case is submitted on alternative theories of premeditated and felony murder. *Id.* at 507, 774 P.2d at 811.

SENTENCE

In the special verdict on the sentence, the trial court found the existence of three statutory aggravating circumstances: previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain. The trial court found

several mitigating factors, but concluded that they were not sufficiently substantial to call for leniency. The trial court specifically found that the total mitigation was not sufficient to overcome any one of the aggravating circumstances. R.T. August 29, 1985, p. 10. As a result of the court's findings, the defendant was sentenced to death.

THE PRIOR CONVICTION

The defendant's 1968 conviction in the State of Utah for second degree murder was found by the trial court to constitute two aggravating circumstances set out in *former* A.R.S. § 13-454(E)(1) and (E)(2) (now A.R.S. § 13-703(F)(1) and (F)(2)).[4] The defendant attacks the trial court's use of these factors to enhance the penalty to death because: (1) society no longer recognizes sodomy as a felony; (2) there is no crime of felony second-degree murder in Arizona; (3) the present Arizona sodomy statute is unconstitutional; (4) former § 13-454(E)(2) (now § 13-703(F)(2)) is not applicable because the Utah offense did not involve violence; and, (5) the Utah conviction is invalid in light of

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[4] The current version of the statute provides in relevant part:

> F. Aggravating circumstances to be considered shall be the following:
>
> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The defendant's conviction of second degree murder occurred in connection with mutual acts of sodomy. The victim was found in a closet with his hands and feet bound and two pieces of cloth around his neck. Apparently, the cloth was tied around the victim's neck for the purpose of restricting the flow of blood to the brain in order to heighten erotic stimulus – a practice known as auto-erotic asphyxiation. In 1968 sodomy was a felony in both Utah and Arizona.[5]

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. *State v. Tittle*, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and

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[5] The current Arizona statute, in effect since 1978, provides that sodomy is a misdemeanor. A.R.S. § 13-1411.

-1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. *See State v. Williams*, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. *See State v. Schad*, 24 Utah 2d 255, 470 P.2d 246 (1970).

> It is so obvious as not to require elucidation that the act of sodomy *committed in the manner shown here*, with the deceased so bound that he choked to death, was an act "greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life."

Id. at 261, 470 P.2d at 250 (emphasis added).

The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but *the manner* in which it was performed. *Schad*, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy,[6] it is clear that a state may lawfully punish a

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[6] Both the United States Supreme Court and this court have held that a state may lawfully prohibit consensual sodomy. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6, *cert. denied*, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d 143 (1976).

person for engaging in conduct exhibiting a knowing or reckless disregard for human life. *See* A.R.S. §§ 13-1103(A)(1), -1104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

CONVICTION FOR FELONY INVOLVING VIOLENCE

The defendant argues that his previous conviction for second degree murder did not involve "violence" within the meaning of A.R.S. § 13-703(F)(2). He argues that the death was an "accident" involving no physical force because he and the victim were consenting homosexual partners. To support this argument, the defendant points to the medical examiner's reports, admitted at the Utah sentencing, stating the the victim had likely tied himself up to heighten his pleasure.

The state argues that murder is inherently a violent crime, and cannot occur absent some type of violence to the victim. *Tittle*, 147 Ariz. at 345, 710 P.2d at 455 (robbery is inherently violent, and so satisfies § 13-703(F)(2)).

It is not necessary for us to resolve this issue because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Transcript of Sentencing, August 29, 1985, p. 10. Any one of the other aggravating factors would be sufficient to support the sentence.

TWO AGGRAVATING FACTORS ARISING FROM SINGLE PRIOR CONVICTION

The defendant claims that the use of a single prior conviction as the basis for two aggravating factors

violates his double jeopardy rights. Therefore, he argues, we should strike at least one of the aggravating factors.

So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. *Tittle*, 147 Ariz. at 345, 710 P.2d at 455. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior conviction since one was enough to impose the death penalty.

FINDING THAT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The defendant claims that the trial court violated his rights when it found that he murdered for pecuniary gain. Former A.R.S. § 13-454(E)(5) (now A.R.S. § 13-703(F)(5)). The defendant contends that the pecuniary gain aggravating factor (1) is unconstitutionally vague, (2) was unconstitutionally applied *ex post facto*, (3) violates double jeopardy, and (4) was not proved beyond a reasonable doubt.

A. *Vagueness*

The defendant argues that the pecuniary gain factor is vague because it fails to distinguish between a killer for hire and a "routine" felony (e.g. burglary or robbery) where a death occurs. Therefore, a person of average intelligence will not understand that his act is a capital crime. *See State v. Bateman*, 113 Ariz. 107, 109, 547 P.2d 6, 8, *cert. denied*, 429 U.S. 864, 97 S.Ct. 170, 50 L.Ed.2d

143 (1976). We have rejected this contention in an earlier case and find no reason to hold otherwise. *State v. Nash*, 143 Ariz. 392, 400, 694 P.2d 222, 230, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985).

B. *Ex Post Facto*

In 1980, this court held for the first time that the pecuniary gain aggravating factor was not limited to contract killers. *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The defendant argues that application of *Clark* to him constitutes *ex post facto* enlargement of the penalty for murder motivated by pecuniary gain when his offense occurred before the *Clark* decision.

A judicial decision is not subject to the constitutional bar against *ex post facto* legislation. *United States v. Walsh*, 770 F.2d 1490, 1492 (9th Cir.1985). However, a defendant's due process rights are violated when an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702-03, 12 L.Ed.2d 894, 899-900 (1964).

In the present case, the defendant misinterprets *Clark*. That opinion did not hold that former A.R.S. § 13-454(E)(5) excluded non-contract/hired-killer situations prior to *Clark*. *Clark* merely rejected the argument that the factor of pecuniary gain was restricted to "hired guns." The *Clark* opinion did not create substantive law, it merely recognized the pre-existing scope of present law.

It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in *Clark*, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

C. *Double Jeopardy*

The defendant also claims violation of his right against double jeopardy. He reasons that use of a general verdict form prevents the court from ascertaining whether the conviction was based on a finding of premeditation or felony murder. The defendant speculates that if premeditation were the basis of the jury's conviction, then the double jeopardy clause would bar pecuniary gain as an aggravating factor since the jury must have "acquitted" him of robbery. Therefore, since it is impossible to determine which type of first degree murder defendant is guilty of, but only that he is guilty of first degree murder, the state failed to prove pecuniary gain beyond a reasonable doubt. *State v. Richmond*, 136 Ariz. 312, 322, 666 P.2d 57, 67, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983); A.R.S. § 13-703(C).

Whether the jury "acquitted" the defendant of robbery is irrelevant. The double jeopardy clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981). Pecuniary gain is not the same offense as robbery. *See* A.R.S. § 13-1902. It is an aggravating factor for determining a defendant's sentence in a capital case. In *State v. Carriger*, 143 Ariz. 142,

161, 692 P.2d 991, 1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985), we stated:

> To prove robbery, the state must show a *taking* of property from the victim, *see* A.R.S. § 13-1902(A); to prove pecuniary gain, the state must show the actor's *motivation* was the expectation of pecuniary gain, *see* A.R.S. § 13-703(F)(5). Proving a taking in a robbery does not necessarily prove the motivation for a murder, and the state cannot be said to be using one fact to prove two different items.

(Emphasis in original.) Even if we were to assume that the jury specifically found that no robbery occurred, double jeopardy does not prevent the trial judge from finding the the defendant's motivation for killing the victim was the expectation of pecuniary gain.

D. *Sufficiency of Evidence*

The defendant finally contends that there was insufficient evidence to show the murder was committed for pecuniary gain. He claims that the only evidence suggesting he killed the victim for pecuniary gain was circumstantial and that the act may well have been an afterthought.

Prior to encountering the victim, the defendant was driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. *Clark*, 126 Ariz. at 436, 616 P.2d at 896. The evidence strongly supports the finding by

the trial judge that the aggravating circumstances of pecuniary gain existed in this case.

MITIGATING FACTORS

The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder. A.R.S. § 13-703(E) requires that the trial court "take into account the . . . mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors . . . which are relevant in determining whether to impose a sentence less than death. . . . " A.R.S. § 13-703(G).

Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. *State v. Vickers*, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed

the defendant's death penalty. *State v. Schad*, 129 Ariz. 557, 633 P.2d 366 (1981), *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982).

Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.

We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another person's death. The death penalty is appropriate in this case.

VOIR DIRE EXAMINATION OF TRIAL JUDGE

The defendant next contends that lack of an opportunity to examine the trial/sentencing judge for bias and/or prejudice in a capital case violated his rights to due process and a fair trial. The defendant argues that *voir dire* examination of potential jurors is a constitutional requirement of a fair trial and should similarly apply in a capital sentencing case where the trial judge sits as a fact-finder.

We recently addressed this issue in *State v. Fulminante*, 161 Ariz. 237, 778 P.2d 602 (1988), *reconsideration granted on other grounds*, (July 11, 1989), and rejected the defendant's claim that he had a constitutional right to voir dire the trial judge. We have also previously held that a defendant must raise this issue at trial or it will be waived. *State v. Rossi*, 146 Ariz. 359, 369, 706 P.2d 371, 381 (1985). Here the the [sic] defendant failed to request *voir dire* of the trial court, and never expressly or impliedly alleged bias or prejudice. Therefore, he waived this issue.

CONSTITUTIONAL CHALLENGES[7]

The defendant raises several arguments that the Arizona death penalty is unconstitutional. The defendant first argues that the statutory scheme for capital punishment is unconstitutionally vague because it fails to provide adequate standards for weighing aggravating and mitigating standards. We have previously considered this argument, and we reject it again. *Rossi*, 146 Ariz. at 366, 706 P.2d at 378. The defendant next contends that

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[7] We are aware of the decision of the United States Court of Appeals for the Ninth Circuit in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *petition for cert. filed*, Mar. 20, 1989, which holds that Arizona's death penalty statute is unconstitutional. The Ninth Circuit opinion invalidates our death penalty scheme on some of the same grounds the defendant raises here. We note that the grounds on which the Ninth Circuit rested its constitutional holdings are grounds on which different courts may reasonably hold differing views of what the Constitution requires. Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them.

Arizona's death penalty statute is mandatory and therefore unconstitutional. As we have done before, we reject this argument. *Id.* Finally, the defendant asks us to reconsider the Arizona death penalty on the following five grounds: (1) the death penalty is cruel and unusual punishment; (2) it denies the defendant a right to a jury trial on the issue of sentencing; (3) it allows the prosecutor arbitrary discretion to seek the death penalty; (4) it places the burden of proving mitigating circumstances on the defendant; (5) it is arbitrarily, capriciously and freakishly imposed. There is nothing in the defendant's case causing us to reconsider the death penalty on any of these grounds. We have rejected them before and adhere to that view. *Id.*

PROPORTIONALITY REVIEW

After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. *Richmond*, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. *State v. McCall*, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), *cert.*

denied, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. *State v. LaGrand*, 152 Ariz. 483, 733 P.2d 1066, *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987); *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982); *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior convictions punishable by life imprisonment. *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988); *State v. Castaneda*, 150 Ariz. 382, 724 P.2d 1 (1986); *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986); *State v. Harding*, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. *State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983), or very young when he committed the crime. *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have

reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

We have examined the record for fundamental error and find none. We affirm the judgment of conviction and the sentence.

GORDON, C.J., FELDMAN, V.C.J., and CAMERON and MOELLER, JJ., concur.

(Seal)

SUPREME COURT
STATE OF ARIZONA

April 18, 1990

RE: STATE OF ARIZONA vs. EDWARD HAROLD SCHAD, JR.
Supreme Court No. 4876-3 (CR-85-0246-AP)
Yavapai County No. 8752

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran recused himself and did not participate in the determination of this matter.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO:

S. Alan Cook, Esq., S. Alan Cook, P.C.
Hon. Robert K. Corbin, Attorney General,
ATTN: Jessica Gifford
Funkhouser, Esq., and R. Wayne Ford, Esq.
Charles R. Hastings, Yavapai County Attorney
Edward Harold Schad, Jr., ASP, Post Office Box B-40496, Florence,
AZ 85232

Supreme Court of the United States

No. 90-5551

Edward Harold Schad, Jr.

Petitioner

v.

Arizona

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Arizona.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

Ocotober [sic] 9, 1990

Justice Souter took no part in the consideration or decision of this petition.